IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONNA BOWEN	
Plaintiff,	CIVIL ACTION
v.	No.:
BANK OF AMERICA, N.A., successor by merger to FIA CARD SERVICES, N.A.	**JURY TRIAL DEMANDED**
Defendant.	

COMPLAINT

INTRODUCTION

1. This action is brought by Plaintiff, DONNA BOWEN, against Defendant, BANK OF AMERICA, N.A., successor by merger to FIA Card Services, N.A., for violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq*.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the federal claims asserted herein pursuant to 28 U.S.C. § 1331 and *Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740, 747 (2012).

3. Venue is proper in this District Court pursuant to 28 U.S.C. § 1391 in that Defendant conducts business in this District, Plaintiff resides in this District, and a substantial part of the events giving rise to this action occurred in this District.

PARTIES

4. Plaintiff, Donna Bowen, is an adult individual residing in Bucks County, Pennsylvania.

5. Defendant, Bank of America, N.A., is a national bank with principal offices located at 100 N. Tryon Street, Charlotte, North Carolina, 28255 and is the successor by merger to FIA Card Services, N.A. ("FIA"), formerly known as MBNA America Bank, N.A.

6. As said successor by merger, BOA is responsible for the liabilities associated with the wrongful conduct of FIA as alleged herein.

FACTUAL ALLEGATIONS

7. At all times mentioned herein, Defendant Bank of America, N.A. and/or its predecessor FIA Card Services, N.A. acted by and through its officers, directors, managers, agents, servants, contractors, attorneys, third-party vendors, representatives and/or employees.

8. Because FIA has been merged into BOA, Plaintiff will refer to both collectively as Defendant.

9. At all times mentioned herein, Plaintiff is and was the owner, subscriber, regular user, and possessor of a cellular telephone with the assigned number ending in "3346".

10. At all times mentioned herein, Defendant, through or in concert with its agents and/or third party vendors, used an Automatic Telephone Dialing System

("ATDS"), a Predictive Dialer ("PD") and/or artificial or pre-recorded voice equipment and services ("APV") to make telephone calls to Plaintiff's aforesaid cellular telephone in an attempt to collect an alleged credit card debt.

11. At no time herein did Defendant have Plaintiff's prior express consent to call Plaintiff's cellular telephone using an ATDS, a PD, or an APV.

COUNT ONE
Violations of the Telephone Consumer Protection Act ("TCPA")
47 U.S.C. § 227, *et seq.*

12. Plaintiff incorporates the foregoing paragraphs as though the same were set forth fully at length herein.

13. Within the four-year period immediately preceding the filing of this action, Defendant made numerous telephone calls to Plaintiff's aforesaid cellular telephone number by using an ATDS, PD and/or APV, all of which violated 47 U.S.C. § 227(b)(1)(A)(iii).

14. During certain times within this aforesaid four-year period, Defendant called Plaintiff's aforesaid cell phone number after which Plaintiff would answer and hear a voice recording telling her to press a number on the keypad to continue with the call.

15. Other times, Plaintiff would answer Defendant's call and hear silence or "dead air".

16. The aforesaid descriptions of Defendant's calls to Plaintiff's cell phone are characteristic and indicative of Defendant's use of both an artificial or pre-recorded voice and an ATDS, as that term is defined by 47 U.S.C. § 227(a)(1); all of which are violative of 47 U.S.C. § 227(b)(1)(A)(iii) in this case.

17. Pursuant to 47 U.S.C. § 227(b)(1)(A)(iii), regarding restrictions on the use of automated telephone equipment:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States— (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice … (iii) to any telephone number assigned to a … cellular telephone service …

18. Further, the Federal Communications Commission ("FCC"), which, pursuant to 47 U.S.C. § 227(b)(2), has been charged by Congress to promulgate TCPA regulations under its rule-making authority, has specifically defined the terms "automatic telephone dialing system" ("ATDS") and "autodialer" to include the use of a "predictive dialer".

19. As explained by the FCC:

> A "predictive dialer" is a dialing system that automatically dials consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a telemarketer will be available to take the call. Telemarketers use such software programs to minimize the amount of downtime for a salesperson. In some instances, however, no telemarketer is free to take a call that has been placed by a predictive dialer, and the consumer answers the phone only to hear "dead air" or a dial tone, causing frustration. *2003 TCPA Order, 18 FCC Rcd at 14014, 14022, para. 8 n.31.*

20. In ruling that a predictive dialer is an ATDS, the FCC stated:

> We believe the purpose of the requirement that equipment have the "capacity to store or produce telephone numbers to be called" is to ensure that the prohibition on autodialed calls not be circumvented. Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of "automatic telephone dialing equipment" and the intent of Congress. *2003 TCPA Order, 18 FCC Rcd. 14014, 14092-14093.*

21. Given Plaintiff's aforesaid experiences answering the calls made to her cell phone by Defendant, it is apparent that Defendant did in fact "store" Plaintiff's cell phone telephone number in its database and did in fact use an ATDS to call Plaintiff's cell phone in violation of *47 U.S.C. § 227(b)(1)(A)(iii).*

22. None of the autodialed calls made by Defendant to Plaintiff's cellular telephone was for emergency purposes.

23. As a result of Defendant's aforesaid TCPA violations, Plaintiff suffered actual damages including emotional distress, anxiety, stress and annoyance.

24. Defendant took purposeful affirmative steps to ascertain Plaintiff's cellular telephone number and then violate the TCPA.

25. Defendant's conduct was done knowingly and willfully.

WHEREFORE, Plaintiff demands judgment against Defendant,

a) in the amount of $1,500.00 for each call made in knowing or willful violation of the TCPA, pursuant to 47 U.S.C. § 227(b)(3) as trebled and permitted by statute;

b) in the amount of $500.00 for each call made in violation of the TCPA, pursuant to 47 U.S.C. § 227(b)(3)(B);

c) declaring Defendant to be in violation of the TCPA and enjoining Defendant from committing any further violations of the TCPA, pursuant to 47 U.S.C. § 227(b)(3)(A);

d) such other relief as the Court deems just and proper.

NOTICE TO PRESERVE DOCUMENTS, RECORDS AND EVIDENCE

Plaintiff hereby demands the Defendant, its officers, directors, managers, agents, servants, employees, representatives, contractors and/or attorneys preserve any and all evidence that is relevant or related to this litigation, including but not limited to all outbound dialing records and lists, call logs, call records, call detail, call summaries, telephone bills, data compilations, data storage records, dialing or call attempt records, dialing or call completion records, artificial voice records or recordings, pre-recorded voice records or recordings, computer records, electronic records or any other documents or data that in any way relate to or reference communications or telephone calls made, or attempted to be made or dialed to Plaintiff, irrespective of whether the communication or telephone call was completed.

JURY DEMAND

Plaintiff hereby demands trial by jury on all triable claims.

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